CIVIL LIBERTIES WITHOUT EXCEPTION:

NCCPR's Due Process Agenda for Children and Families

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INTRODUCTION

Suppose Attorney General Jeff Sessions were to propose anti-terrorism legislation with the following provisions:

Special anti-terrorism police could search any home without a warrant – and stripsearch any occupant -- based solely on an anonymous telephone tip. Any occupant of the home could be detained for 24 hours to two weeks without so much as a hearing – and they'll probably be detained far longer because, in the special anti-terrorism court set up by this legislation, all the judges are afraid to look soft on "terrorists."

At that first hearing the detainees may – or may not – get a lawyer just before the hearing begins, and they almost never get effective counsel.

At almost every stage, the standard of proof is not "beyond a reasonable doubt" or even "clear and convincing" but merely "preponderance of the evidence," the lowest standard in American jurisprudence, the same one used to determine which insurance company pays for a fender-bender.

And in most states, all the hearings and all the records are secret.

Were Sessions ever to propose such legislation, it's reasonable to expect that civil libertarians will respond with even more fury than they did to the Trump Administration's attempt to bar people from predominantly Muslim nations from entering the country.

*Yet this hypothetical anti-terrorism law already **is** the law governing child welfare. And sadly, many who in other circumstances are quick to defend civil liberties either stand silent or support it.*

The National Coalition for Child Protection Reform believes the only way truly to protect children is to demand civil liberties without exception. There can be no true child protection when a government agency is given virtually unchecked power, almost no accountability, and operates in secret.

That is why enacting meaningful due process protections for families is at least as important as improving the "services" they receive from child welfare agencies.

Since 2000, NCCPR has issued more than 30 reports on 20 state or local child welfare systems. Below are some of the due process recommendations from these various reports.

RECOMMENDATION 1: TRANSPARENCY

All court hearings in cases where child abuse or neglect is alleged and almost all documents should be subject to a "rebuttable presumption" of openness.

Hearings and records would be closed only if the lawyer for the parents or the guardian *ad litem* for the child could persuade the judge, by clear and convincing evidence, that opening a given record or portion of a hearing would cause severe harm to a child.

The judge then would keep closed only the minimum amount of material needed to avoid the damage.

The people who work for child protective services (CPS) agencies are not evil. But even the best of us would have trouble coping with nearly unlimited power and no accountability. One caseworker allegedly told some parents: "I have the power of God." It's alarming if he said it. But what's even more alarming is: It's true. Caseworkers for CPS agencies *do* have the power of God.

"[Opening family courts] has been 100 percent positive with no negatives … Our worst critics will say it was the best thing we ever did. Their fears were unfounded … I wish other states would do it."

--Jonathan Lippman,
Former Chief Administrative Judge,
State of New York

To give a young, inexperienced worker the power of God, send her out on what she is convinced is a godly mission to rescue innocent children from the scum of the earth -- knowing that there will be no penalty for removal and hell to pay if she leaves the child home and something goes wrong -- and then expect her to exercise *self*-restraint is more than can be expected of most human beings. Rarely is the power of God accompanied by the wisdom of Solomon.

The power must be checked by accountability. Accountability is not possible in secret. Nor is accountability possible simply by hiring people with more expertise and assuming they will do the right thing.

It's not supposed to work that way in a democracy. That is why it is so urgent that all court hearings and almost all records in child welfare cases be presumed open.

An exception would be made to the presumption of openness for portions of documents that name people who reported child abuse in confidence. Even then, however, if a parent claims to be a victim of harassment, that parent should be allowed to ask a judge to review the record and, if the judge agrees there has been harassment, open this record as well, and give the accused the right to sue. (See Recommendation 9).

Only the lawyer for a parent and the guardian *ad litem* for a child should be allowed to request secrecy. CPS should not even be allowed to ask for it. CPS has no interest in secrecy other than as a way to cover up its failings. If secrecy truly is needed to protect a child, that's what the lawyers for the child and the parents are there to ask for.

The argument against opening hearings and records is that it would embarrass children.

That argument fails on several counts:

- The alleged potential for trauma does not explain why information is kept secret even after a child has died.
- In the overwhelming majority of cases there are no graphic details to report. Most cases involve "neglect." A child will not be testifying about being beaten or raped because that's not the accusation.
- The most traumatic cases are likely to involve not only child protection proceedings but criminal cases as well. These hearings already are public. Yet we have never seen nor heard a single account of a child saying that she or he was traumatized by the fact that such a trial was public. Nor do we

know of any adult coming forward years after the fact to complain of such trauma.

- At least 14 states have opened child protection proceedings to the press and the public. Two more let in reporters only. Because these include some of the largest jurisdictions in the country, such as New York, Florida, Texas, and Illinois, NCCPR estimates that roughly 41 percent of all foster children live in a place where court hearings are open.

In every one of these places, the same fears were expressed. But a comprehensive nationwide examination by the *Pittsburgh Post-Gazette* found that none of the problems materialized. Indeed, over and over, one-time critics became converts.[1]

"Everyone complains about everything in New York," said Judith Kaye when she was chief judge of that state's highest court, the Court of Appeals. But, she says, in the years since she ordered all of the state's family courts opened, "we've had no complaints about this."

Her deputy at the time, and then her successor as Chief Judge, Jonathan Lippman, said "It has been 100 percent positive with no negatives … Our worst critics will say it was the best thing we ever did. Their fears were unfounded … I wish other states would do it."

One of those who initially opposed the change was Michael Gage, former administrative judge of the New York City family court. But now, Gage says, "I think it worked. From my view, it worked remarkably well."

Another opponent was Jane Spinak, then head of the Juvenile Rights Division of the Legal Aid Society in New York City. But, Spinak says, "the consensus now is that [the court] is better open than when it was closed."

Once the courts were opened, reporters saw the shabby conditions families had to endure. That led to funding for repairs. It's also helped raise fees paid to the lawyers who defend impoverished parents – from $40 an hour in court and $25 an hour out of court, to $75 an hour for both - still not nearly enough, but an improvement.

Opening New York's family courts probably also helped build support for New York City's initiative to create an adequately-funded institutional provider of counsel for birth parents in many cases. (See Recommendation 4).

The head of New York City's child welfare agency when the courts were opened, Nicholas Scoppetta, said opening up the process helped him improve his agency. "We have not experienced a downside," he said.[2]

New York is not alone. In Illinois, the press has been allowed into juvenile court for more than a century. The former head of the state's child welfare agency, Jess McDonald, says the public should be allowed in, too. "We will only make mistakes if we are hidden in the back room," McDonald says.

The reform-minded head of Allegheny County, Pennsylvania's child welfare system, Marc Cherna, also supports opening hearings. And he supported the county's judges when they agreed to give regular access to a reporter from the *Post-Gazette*.

In Oregon, hearings in abuse and neglect cases have been open for more than 25 years. "The appearance of being treated fairly is compromised when things are done in secret," says Oregon Circuit Judge Daniel Murphy. "People are suspicious of anything done secretly."

But perhaps most revealing is this: Of all the states to open proceedings, only one allowed them to close again – when a limited experiment in Connecticut ended.

Everywhere else, the courts stayed open. For example, after three years of experimenting in 12 counties, the Minnesota Supreme Court opened courts in child mal-

treatment cases statewide.[3] Surely if the experiment had been traumatizing children, it never would have been expanded.

And as noted above, about 41 percent of America's foster children now live in places where court hearings are open. Surely, if this had been traumatizing children, there would have been an avalanche of complaints. That hasn't happened.

That shouldn't come as a surprise. Cases covered by the media are likely to fall into these categories:

- Cases where the child has been killed.
- Cases where the alleged abuse is so brutal that the details already are public knowledge because of police reports. These cases also are likely to be the subject of public, criminal proceedings.
- Overview stories about court systems, in which case examples can be used without revealing names.

No state court judge in America had a better reputation for concern about the welfare of children than the late Judge Kaye in New York. For years after courts were opened in that state, she stood by what she said at the time:

"Sunshine is good for children."

RECOMMENDATION 2: OPEN RECORDS. Reverse the current presumption that most child welfare records are closed, and allow child welfare agencies to comment freely on any case made public by any other source.

As noted above, roughly 14 states allow the press and public into court hearings in child abuse cases.

This provides more accountability than exists in states where the entire process is secret. But it is not enough.

The amount that can be learned from what is often a cursory hearing lasting only a few minutes is limited. Therefore it also is urgent to reverse the current presumption that case records are closed.

This, of course, goes much farther than most state laws. But it also is more than most news organizations have sought when it comes to case records. News organizations generally seek transparency only in cases of child abuse fatalities.

"Sunshine is good for Children."

--Judith Kaye, former Chief Judge, New York State Court of Appeals.

While that is better than nothing, it has an unintended consequence: This limited degree of openness reinforces the misperception that the system errs only in one direction, leaving children in dangerous homes.[4]

The thousands of families who say their children were wrongfully removed still have no way to prove it; they remain thwarted by a "veto of silence."

They can tell their stories to reporters, but even if they have some limited documentation, the reporters may decline to write about the case, rather than risk the possibility that people at CPS are telling the truth when they heave meaningful sighs and say, as they so often do, "Oh, there's really so much more to it, and we *wish* we could tell you, but our hands are tied: Confidentiality, you know." Or reporters themselves may use this as an excuse to avoid doing stories that challenge their own preconceived notions.

If almost all CPS records were available to the public, reporters would have a much better look at all sides of the story. (Records are not always accurate, however, and claims in them should not be accepted at face value.)

Therefore, there should be a "rebuttable presumption" that almost all case rec-

ords are open. As noted above, the names of people reporting alleged maltreatment almost always would remain confidential. Most other records would be opened unless the lawyer for the parents or the law guardian for the child could persuade the judge, by clear and convincing evidence, that opening a given record would cause severe emotional damage to a child.

"Dependency court remains a secretive, insular place where the rights of indigent parents to effective representation are sacrificed in favor of judicial expediency and entrenched insider groups."

-- Michael Kresser, Executive Director, Sixth District Appellate Program, California.

The judge then would keep closed only the minimum amount of material needed to avoid the damage.

RECOMMENDATION 3: Child welfare agencies should be free to comment on any case that has been made public by any other source. For example, if a parent goes to a reporter and says "my child was wrongfully taken," CPS should be free to tell its side of the story, as well as to release records under the conditions noted above.

At least four states have such laws, with varying degrees of limitations. The broadest we know of is in Arizona, where the child welfare agency is free to "confirm, clarify or correct" any material about a case made public by anyone else.[5] (Unfortunately, that has not stopped CPS in that state from hiding behind dubious claims of confidentiality.)

Such a law serves two valuable purposes. First, it will encourage reporters to override the veto of silence. No longer could CPS say it wished it could talk but it could not. Now reporters would know the agency was stonewalling. Conversely, when CPS is right, it's important that the public know it. The agency should have the right to vindicate itself.

RECOMMENDATION 4: Quality legal representation must be available to all parents who must face CPS.

It is ludicrous to claim that children are protected from needless removal when their impoverished parents often are, literally, defense-less.

In some states, indigent parents have no right to counsel until the very end of the process, the termination of parental rights stage. In most states, they don't get a lawyer until moments before – or right after – the first court hearing, which often is, in fact, the most important, since that's where judges routinely ratify removals that caseworkers have made on their own authority.

Even when parents get a lawyer, it is likely to be a grossly overworked, underpaid attorney who has time to do nothing more than tell parents to give in to whatever CPS wants if they ever want to see their children again.

An assessment from the director of a program co-coordinating appeals for indigent parents in California could apply to almost any state or county in America.

Said Michael Kresser, executive director of California's Sixth District Appellate Program: "Dependency court remains a secretive, insular place where the rights of indigent parents to effective representation are sacrificed in favor of judicial expediency and entrenched insider groups."[6]

This system needs to be replaced with one which guarantees indigent parents

Leveling the playing field in two states

In Pierce County, Washington, the judge in charge of the county's juvenile courts was dismayed at the escalating rate of terminations of parental rights – knowing that he was dooming some of the children to a miserable existence in foster care.

So he persuaded the legislature to provide enough money for defense attorneys to have resources equal to those of the Attorney General's office, which represents the state child welfare agency in juvenile court. The result: successful reunification of families increased by more than 50 percent.

And that's not because lawyers "got their clients off."

Where the parents are innocent, lawyers have time to prove it. Where there is a problem in the home that must be corrected, the lawyers have time to sit down with the parents, explain early on what they are up against and guide them through the process of making whatever changes are needed. They also can advocate for more and better services geared to what families really need, instead of the cookie-cutter "service plans" often offered by child welfare agencies.

Between 2000 and 2003, of 144 cases in the program in which families were reunified, not one was brought back to court.

"These children aren't coming back," says then-Washington State Supreme Court Justice Bobbie Bridge, a supporter of the program, "and we do get them back when we make bad reunification decisions."

The National Council of Juvenile and Family Court Judges is publicizing the results, and even the State Attorney General at the time, who had to face the better-prepared lawyers, supported the project and wanted it expanded.[7]

A 2011 evaluation found that in counties that have this kind of representation children are reunified more quickly. And when reunification really isn't possible, guardianship and adoption occur more quickly as well.[8]

New York City provides similar representation for half of all indigent parents in four of the city's five boroughs. The city does this with the support of its child welfare agency, the Administration for Children's Services. This is because ACS recognizes that it is not infallible, and recognizes the role lawyers for parents can play in fighting for help for families.

It's also probably because, while at the Annie E. Casey Foundation, before becoming ACS Commissioner (a job he left in September, 2011) John Mattingly co-authored a scathing report on how the city's Family Courts ran roughshod over families. The report quoted judges admitting they routinely rubber-stamped removals even when they thought ACS failed to make its case, because they were afraid of winding up on the front page if they sent a child home and something went wrong.[9]

The Center for Family Representation holds the contracts to provide this representation in Manhattan and Queens.[10]

Since 2004, CFR has pioneered a model of team representation.

The family is represented by an attorney, a social worker and a parent advocate, described by CFR as "a parent who has directly experienced the child protective and foster care systems and has successfully reunified with his/her child."

CFR reports that the children represented this way

"spend, on average, 73 percent less time in foster care than children in the city and state and in 50 percent of our cases, children never enter care at all, but instead stay at home with the services needed to help them stay safe and thrive."[11]

CFR reports that the results are even better when their teams can reach a family during an investigation but before the family is charged. In those cases, placement was avoided 95 percent of the time.

It's also cost-effective. In New York it costs an average of $49,188 to keep one child in foster care for a year. The costs range from an average of $25,000 per year per child in a family foster home to $92,000 per year per child for a group home or institution. In contrast, the City estimates the average cost of a year of preventive services, for an entire family, at $10,000.[12] And CFR can represent an entire family for $4,000 to $6,000.[13]

a lawyer from at least the moment the child is removed – or the moment an agency decides to go to court to place a family under its supervision -- even while leaving the children at home. Every county, or the state, should be required to establish an institutional provider of defense counsel with resources at least equal to those available to the lawyers who represent the child welfare agency.

Providing "law guardians" for children is not enough to protect them from wrongful removal, for two reasons.

First, law guardians tend to rubber-stamp child welfare agencies, fighting them, if at all, only when the agencies want to return children home. They are often too overwhelmed to do an independent investigation and, even when they can, they tend to buy into the same take-the-child-and-run mentality that dominates child welfare agencies. (Anyone who doubts this should put a simple two-question test to law guardians: How many times, when CPS wants to return a child home, do you disagree? How many times, when CPS wants to hold a child in foster care, do you disagree?) The second problem with relying on law guardians is discussed in Recommendation 6.

RECOMMENDATION 5: The institutional provider of counsel should have lawyers available 24-hours-a-day, seven-days-a-week, so that they can begin to work on a case from the moment a child is removed from the home instead of only at or after the first hearing – or even later – as usually is the case now.

RECOMMENDATION 6: Law guardians should act as lawyers. Guardians *ad litem* (GALs) should advocate for what the children they represent want, even if the GAL does not think it's in the child's best interests.

In New York State, Judge Kaye ordered GALs to take this approach. But in most states, the job of the guardian is to fight for what the *guardian* thinks is best for the child – even if the child disagrees. The guardian may make the court aware of what the child wants but, if the guardian thinks that is bad for the child, the guardian fights against the child's wishes. That can mean that the only parties without strong advocates in their corners are the parents – and the child.

There always will be screening in child welfare. The choice is not between screening and no screening. The choice is between rational screening and irrational screening.

Of course, the fact that a child wants a particular outcome doesn't mean he or she should get it. And some children are too young to express a rational preference, or any preference at all. But deciding what's best is what judges are for. And they can't truly do justice unless everyone has an advocate making the best possible case for his or her side.

RECOMMENDATION 7: Before a call is accepted by a child abuse "hotline" and referred for investigation, the caller must be able to demonstrate that s/he does, indeed, have "reasonable cause to suspect" maltreatment.

The caller must be able to offer something more than a guess that a child really is being abused or neglected. To help hotline operators accomplish this goal:

RECOMMENDATION 8: A rational method must be established for screening hotline calls.

Child abuse hotlines vary in their power to screen in or screen out calls. In some states, virtually every call, no matter how absurd, must be passed on. This only further overwhelms workers making it less likely that they will be able to investigate any case carefully – and less likely that they will find children in real danger.

Every hotline needs to have a protocol of questions to be asked of callers to determine if the case rises to a level requiring an investigation.

RECOMMENDATION 9: Anonymous calls should not be accepted.

Of all the sources of child abuse reports, anonymous reports consistently are the least reliable. They're almost always wrong.

A study of every anonymous report received in the Bronx, New York, over a two year period found that only 12.4 percent met the incredibly low criteria for "substantiating" reports – and not one of those cases involved death or serious injury. The researchers found that "one case was indicated for 'diaper rash' one case for welfare fraud, and two cases because the apartment was 'dirty.'"[14]

Anonymous reporting should be replaced by *confidential* reporting. If someone who may have a grudge or someone who simply may be clueless wants to claim that, say, a neighbor is abusing a child, that person should be required to give the hotline operator his or her name and phone number. That information still should be kept secret from the accused in almost all cases, but the hotline needs to know. That will immediately discourage false and trivial reports.

As noted in the recommendation on records, the law should allow the accused to go to a judge and explain why he feels he is being harassed by false reports, and by whom. The judge should check the record and, if the accused is right, and if the judge is persuaded that the reports are an act of harassment, the name should be released to the accused, who should have the right to sue for damages.

Of course, the objection to banning anonymous reports, and the objection to any kind of serious screening mechanism, is that some anonymous calls may be legitimate.

That's true.

If you ban anonymous reports, some real cases might be missed – though anyone who is sincere and has genuine reason to suspect maltreatment should be comfortable with confidential reporting.

But *more* real cases are missed now by overloading the system.

There always will be screening in child welfare. The choice is not between screening and no screening. The choice is between rational screening and irrational screening. The more cases that cascade down upon investigators the less time they get for each one. So some get short shrift. It is far safer for children if cases are screened rationally by eliminating anonymous reports, rather than irrationally based on which file floats to the top of the pile on a caseworker's desk.

As the authors of the Bronx study put it, in recommending that anonymous reports be rejected: "The resources of child protective agencies are not limitless. The time and energy spent investigating false reports could better be given to more serious cases, and children may suffer less as a result."[15]

RECOMMENDATION 10: No one should be listed in a central register of alleged child abusers, and no allegation should be substantiated, until, at a minimum, the family has had an administrative hearing conducted by a hearing officer outside of the child welfare agency. The standard of proof should be "clear and convincing."

All states have massive databases listing everyone caseworkers suspect of

being a child abuser. Most databases also include the names of people even when the accusation was determined to be "unfounded."

This poses enormous risks to children. Anyone can be declared a child abuser based on no more than a caseworker's guess. All she has to do is check a box on the form. Then the accused must fight her or his way out.

In some cases, there is no way to fight your way out at all. Some states allow for no appeal of this decision. In other states, the appeal process is long and cumbersome.

> In child welfare, where there's smoke, there often is only smoke – and no one can see clearly through smoke.

Yet a listing in a central register can have profound consequences. In many states it effectively bars employment in fields dealing with children.

Four states have been forced by courts to bolster protections for the accused, though the protections still don't go far enough.

In *Valmonte v. Bane,*[16] the U.S. Court of Appeals for the Second Circuit ruled that even though New York State does have an appeals process, it did not provide adequate protection for the accused. Such protection is needed, the court ruled, because listing someone who works with children in the state's central register of alleged child abusers almost always deprives the accused of employment in their chosen field.

The second decision, handed down by a federal district court in Illinois, is even more sweeping. In *DuPuy v. McDonald* [17] that court found the central register process unconstitutional on a variety of grounds including the fact that, while it was possible to appeal, the process was incredibly cumbersome and lengthy.

One key point that was common to these cases: In both Illinois and New York, when people did manage to appeal, the original finding of abuse or neglect was overturned 75 percent of the time.

The Missouri Supreme Court has ruled that no one can be listed in that state's Central Register without an administrative hearing first.[18] In North Carolina a court hearing is required first.[19]

As always, CPS agencies will claim that any curb on their power to effectively blacklist anyone they choose will compromise their ability to protect children. In fact, depriving people of employment based on rumor and innuendo is enormously harmful to children.

- Obviously, if a parent can't get work, that will affect his or her children.
- If information based on little more than a caseworker's guess is allowed to pile up in secret files, sooner or later some CPS worker is likely to claim that there is a "pattern" and use that as the basis to take away the children.

Children need protection from the mindless piling up of rumor and innuendo in files about their families.

This is particularly true when *unfounded* reports are kept. These are files on people who usually are so innocent that even the meager amount of evidence needed for one worker to substantiate the allegation couldn't be found. Keeping such reports is an incentive for people to use the system for harassment. Make enough anonymous calls, set off enough investigations, and sooner or later something is bound to stick. Therefore:

RECOMMENDATION 11: When a report is "unfounded" all records should be expunged within 30 days.[20]

The reason unfounded reports should be expunged is the same reason CPS agencies want to keep them. Once again, they say they are needed to detect "patterns" or, as they often like to put it "where there's smoke, there's fire." But a pattern of rumor and innuendo is so misleading that it is worse than no pattern at all. In child welfare, where there's smoke, there often is only smoke – and no one can see clearly through smoke. Furthermore:

● If you make it too easy for a worker to accuse the most convenient suspect, list them as "substantiated" child abusers and move on, there is a good chance that in situations where there really is abuse, the wrong person will be accused - and someone who really is guilty never will be caught.

● And, perhaps most important, these listings are not necessarily limited to adults. Children themselves can be listed as child abusers. In the lead case in *DuPuy* the accused was a ten-year-old girl who was accused of sexual abuse after she pulled up the pants of some much younger boys who were "playing doctor" in the day care home run by her family.

As the appeals process dragged on and on, the child became so depressed that at one point she attempted suicide.

RECOMMENDATION 12: From the moment a child is removed until the first hearing at which all sides are represented, the child welfare agency shall be responsible for arranging daily visits, unless it can show, by clear and convincing evidence, that this would cause severe emotional harm to the child.

This would help ease the emotional trauma done to the overwhelming majority of children by the act of removal itself. But it also serves another purpose.

There are very few "front door" methods to prevent wrongful removal of children. This is a way of getting at the problem through the "back door."

This idea was first proposed as part of a very good model law written by Prof. Michael Wald of Stanford University Law School in 1976, and revised by an American Bar Association Committee in 1981.

A requirement for daily visits, unless CPS can show by clear and convincing evidence that this would cause severe and lasting emotional trauma to the child, (physical trauma can be prevented by having the visits supervised) will help ease the trauma of the removal itself.

CPS will scream about how burdensome it is. But that's the idea. If a CPS worker knows that taking a child on his or her own authority will be followed by a requirement that he or she set up several days worth of visits, that worker might be more careful about who is taken away.

RECOMMENDATION 13: All interviews conducted by CPS personnel in the course of child maltreatment investigations – not just interviews with children – should be, at a minimum, audiotaped, and preferably videotaped. Interviewees must be informed that their statements are being recorded. Information from any interview that is not taped should be inadmissible in all court proceedings.

In an age of smartphones with audio and sometimes video recording capability anything less than requiring that all interviews be taped is extremely dangerous to children.

The most obvious danger is reflected in the mass molestation hysteria of the 1980s, in which hundreds of children in cases such as the McMartin Preschool were pressured into saying what interrogators wanted to hear. Only the existence of tape recordings prevented even worse miscarriages of justice.

But it's just as important to tape record interviews with everyone else. Over and over again, all over the country, one hears the same refrain from victimized families:

The worker was selective. The worker wrote down only what supported her position and ignored the rest.

And it's not just aggrieved parents expressing these concerns. In a scathing decision, a juvenile court judge in Connecticut blasted that state's child welfare agency for "an appalling combination of arrogance and ineptitude." She ruled that CPS deliberately left out exculpatory information in order to obtain emergency removal of a child. The judge wrote:

There is no other purpose for this affidavit other than to mislead the court into believing that [the child] was in immediate physical danger from her surroundings and only her immediate physical removal ... would ensure her safety. The court finds that [the Connecticut child welfare agency] intended to manipulate the facts to obtain an order that it knew the facts could not justify.

The judge felt compelled to encourage Connecticut CPS to remind its workers of the punishment for perjury.[21]

A former family court judge on Staten Island, New York wrote this:

While I found the majority of child care agencies to be caring and trustworthy, there were enough instances of deceptive agency reports that I decided to order independent investigations of every agency adoption case that came before me. It's a course of action that remains prudent today.[22]

And in California, caseworkers claimed what amounted to a constitutional right to lie in court.[23] Fortunately, an appellate court rejected the argument.[24]

If a CPS agency wants to claim that kind of thing never happens in its own state, then let the agency prove it. Tape all the interviews, and then the people will know. Indeed, CPS should welcome this requirement, since it isn't just a way to protect the innocent – it's a way to convict the guilty. A defense lawyer can't successfully claim that a child was manipulated or a parent's comments were distorted if there is a tape that proves otherwise.

Even when it is clear that workers are not lying – and in most cases, they probably do not misrepresent facts on purpose -- taping still is essential.

A basic tenet of communications theory is that people tend to hear what they want to hear or what they expect to hear. Everything we hear is filtered through our life experiences, our beliefs, and our prejudices. There is no excuse *not* to require that every interview done by a CPS worker in the field be, at a minimum, audiotaped and every interview done at a CPS office or similar facility be videotaped.

As important as requiring taping itself is a requirement that interviews that are not taped be treated, in effect, as though they don't exist.

In criminal cases, evidence obtained improperly cannot be admitted – no matter how compelling that evidence may be. The requirement is an attempt to be sure that police are scrupulous about the rights of citizens when they gather evidence.

If taping is "required," but notes from interviews that were not taped still can be used in court, it is an invitation for apps to "fail," workers to "forget" and batteries to "die" on a regular basis.

RECOMMENDATION 14: The standard of proof in all court proceedings should be raised from the current standard in most states, "preponderance of the evidence," to "clear and convincing." The standard also should apply when a worker decides to "substantiate" alleged maltreatment.

There are few punishments one can inflict on a *child* that are more severe than needlessly tearing away her or his family. And yet, when it's time for courts to decide to place a child in foster care, they do not apply the standard used to convict someone

accused of murdering a child, "beyond a reasonable doubt," or even the middle standard, "clear and convincing" evidence. Instead, courts in most states apply the lowest standard of proof, "preponderance of the evidence." As we noted at the start of this report, this is the same standard used to decide which insurance company pays for a fender-bender.

Only at the very end, when the issue is termination of parental rights, does the standard rise to "clear and convincing" – and it took a U.S Supreme Court case to make that the law of the land in all 50 states.[25]

The "clear and convincing" standard should be the standard for every decision, from the moment a caseworker decides whether to "substantiate" a case, through initial removal, through continuing foster care.

Opponents say, in effect, that if caseworkers ever actually had to provide real evidence that a parent did something wrong before they took away the children, then children might be left in unsafe homes.

But if the standard is not raised, even more children will be subject to the unconscionable trauma of needless foster care – and some of them will be abused in foster care itself. Furthermore, the system will continue to be overwhelmed and that will lead to more children in real danger being missed.

In fact, even if the standard is raised, the impact may be limited. Some states already use a clear and convincing standard – yet the rate of child removal in those states appears to be no lower than others. In other words, no matter what the law says, judges tend to apply a standard that boils down to almost no standard.

The impact of raising the standard is likely to be symbolic – if it is raised with enough media attention it might cause at least a temporary reduction in needless removals of children. In addition, it may increase the chances of bad decisions being overturned on appeal.

RECOMMENDATION15: **Abolish legal "ransom."**

That's not what it's called, or course. But many states require impoverished parents to dig themselves deeper into poverty in order to help reimburse the state that took away their children for the cost of "care."

When someone takes away a child and demands money to give the child back, there's a word for that payment: Ransom.

When someone takes away a child and demands money to give the child back, there's a word for that payment: Ransom.

This legal ransom punishes innocent families, it punishes the taxpayers it is intended to help, and, worst of all, it punishes children.

The overwhelming majority of parents who lose children to the system have no money to spare. Often that's why their children are in foster care in the first place.

Because the standard of proof in child welfare proceedings is so low, this provision inevitably punishes many innocent families.

The purpose of foster care is to keep the child safe. Everyone concedes it is harmful to take a child from his or her parents and the longer the foster care the greater the harm. If you make ransom a condition of returning the child and the parents manage to do everything else but still owe the ransom, the foster care is prolonged even though the home is now safe. That is punishing the *child* for the alleged financial

failings of the parents.

For the same reason, ransom actually costs taxpayers more. For every extra day a child is held in foster care because the birth parents haven't paid their "share" of the costs, the state has to foot the entire bill. The birth parents wind up in a deeper and deeper hole and the state winds up paying more and more.

Even if the birth parents scrape together the money to get their child back, the payments only make it harder to get out of poverty. Poverty often creates stress that leads to actual child abuse, or poverty itself is confused with neglect – so the ransom increases the chances of actual child abuse and/or having the child taken away again because of poverty. Once again, you harm the child – and cost the state more money.

RECOMMENDATION 16: In all places where it appears, the phrase "best interests of the child" should be replaced with the phrase "least detrimental alternative."

Currently, almost all state laws involving custody of children are liberally sprinkled with the phrase "best interests of the child."

But that is a phrase filled with hubris. It says we are wise enough always to know what is best and capable always of acting on what we know. In fact, those are dangerous assumptions that can lead us to try to fix what isn't broken or make worse what is.

More than forty years ago, three scholars, Albert Solnit, Joseph Goldstein, and Anna Freud, proposed an alternative phrase. They said "best interests of the child" should be replaced with "least detrimental alternative."[26]

"Least detrimental alternative" is a humble phrase. It recognizes that whenever we intervene in family life we do harm. Sometimes we must intervene anyway, because intervening is *less* harmful than not intervening. But whenever we step in, harm is done.

The phrase "least detrimental alternative" is a constant reminder that we must always balance the harm that we may think a family is doing against the harm of intervening. It is exactly the shot of humility that every child welfare system needs.

NOTES:

[1] All of the quotes in this section are from the *Pittsburgh Post-Gazette* series, "Open Justice," by reporter Barbara White Stack. (Sept. 23-25 2001).
[2] Barbara White Stack, "Freedom to speak can lead to reform," *Pittsburgh Post-Gazette*, Sept. 24, 2001.
[3] Associated Press, Minnesota wire "Court orders child protection records opened to public," Dec. 27, 2001.
[4] Simply because more children are in their own homes than in foster care, in raw numbers, more children die in their own homes.
[5] Arizona Revised statutes, 8-807,
[6] Karen de Sa, "Dependent on same lawyers," *San Jose Mercury News*, August 9, 2008.
[7] Heath Foster, "Relying on good advice can reunite troubled families," *Seattle Post-Intelligencer*, February 12, 2003, p.B1.
[8] Mark Courtney, et. al., "Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care," *Partners for Our Children Discussion Paper,* Vol. 1, Issue 1, Feb. 2011.
[9] Special Child Welfare Advisory Panel for New York City, *Advisory Report on Frontline Practice* (2000), p. 48.
[10] Center for Family Representation, *Bringing Innovative Legal Services to Scale: A Brief History of CFR's Community Advocacy Teams: from Pilot to Promise* (2010).
[11] Ibid.
[12] Kathleen Maher, *Fiscal Brief: How Has Shift Away From Foster Care Affected Funding, Spending, Caseloads?* (New York City Independent Budget Office, October, 2011).
[13] Center for Family Representation, note 8, supra.
[14] William Adams, Neil Barone and Patrick Tooman, "The Dilemma of Anonymous Reporting in Child Protective Services," *Child Welfare* 61, no. 1, January, 1982, p.12. Yes, it's an old study. We wish there were a newer one. But child welfare agencies almost never ask questions to which they don't really want to know the answers – and there's no reason to think anonymous reporters have gotten any more reliable in recent years.
[15] Ibid.
[16] 18 F.3d 992 (2nd Cir. 1994). NCCPR's Vice President served as counsel for plaintiffs in this case.
[17] No. 97 C 4199, slip op. at 78-79 (N.D. Ill. March 30, 2001). A former NCCPR board member served as co-counsel for plaintiffs.
[18] Supreme Court of Missouri, *Johnson v. Missouri Dept. of Social Services*, case # SC87360, March 13, 2007.

[19] North Carolina Division of Social Services, Child Welfare Services, Change # 03-2016 *Responsible Individuals List*, December, 2016.
[20] The only exception should be if the accused believes he or she is being harassed and wants time to ask a judge for permission to see the record.
[21] Colin Poitras, "Social Worker Distorted Case; Judge: Child's Removal Was Unnecessary" *Hartford Courant*, August 5, 2004.
[22] Daniel Leddy, "Advocates are at times overzealous, even dishonest, in their zeal" *Staten Island Advance*, December 2, 2004.
[23] Richard Wexler, "Lessons for Child Welfare From the California 'Right to Lie' Case," *Chronicle of Social Change*, Oct. 18, 2016.
[24] John Kelly, "9th Circuit's Epic Dis of 'Caseworker's Right to Lie' Case," *Chronicle of Social Change*, Jan. 4, 2017.
[25] *Santosky v. Kramer,* 455 U.S. 745 (1982). The lawyer who won this case now serves as President of NCCPR.
[26] Joseph Goldstein, Anna Freud, Albert J. Solnit, *Beyond the Best Interests of the Child*, (New York: The Free Press, 1973), p.53.

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